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The Great Eastern Life Assurance Co Ltd v Indra Janardhana Menon (representing the estate of the deceased, NVJ Menon)

B FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02–3 OF 2005(W)
SITI NORMA YAAKOB CJ (MALAYA), STEVE SHIM CJ (SABAH & SARAWAK) AND ABDUL HAMID MOHAMAD FCJ
18 NOVEMBER 2005

C *Limitation — Breach of contract — Reckoning of time — No modification or alteration to shift time of breach — Whether time began to run from date of breach — Whether disparate obligations to pay from time to time could be construed as a single continuing obligation so as to circumvent s 6(1)(a) Limitation Act 1953 — Whether provisions of Limitation Act ceased to apply to a breach of contract if parties remained in contractual*
D *relationship — Limitation Act 1953 s 6(1)*

The claimant was an agent and DSO (divisional sales officer) with the appellant. He earned commissions from life insurance policies that he sold for the appellant. He
E was also entitled to overriding commissions in respect of the sales of group insurance schemes by agents introduced by him to the appellant. In 1984, the claimant introduced one Indrani to the appellant. In 1986, Indrani sold a group insurance scheme for the appellant. The claimant made a claim for overriding commission on Indrani's sale. The appellant denied liability based on a Circular that regulated
F entitlement to overriding commissions. The appellant alleged that pursuant to the Circular that was in effect from 1 January 1987, claims for overriding commissions in respect of sales prior to 1 October 1987 did not qualify. Since Indrani's sale was in 1986, no commission was payable. The appellant formally indicated its refusal by letter dated 16 July 1990. In April 1993, the claimant filed a suit against the
G appellant, claiming, inter alia, his commission on Indrani's sale. The High Court dismissed his claim on, inter alia, the grounds: (a) the claims for overriding commission prior to April 1987 were time barred; and (b) there was no provision for overriding commissions in the several agreements that regulated the claimant's relationship with the appellant. The claimant appealed to the Court of Appeal which, inter alia, allowed his appeal on the basis that: (i) the Circular entitled him to
H overriding commissions; and (ii) his claim was not time-barred under s 6(1) of the Limitation Act 1953 ('the Act'). The Court of Appeal was of the view that rule-governing limitation of actions was displaced by the intention of the parties. Further, the obligation to pay overriding commissions was a continuous obligation. The Court of Appeal granted leave to the appellant to pose the following questions
I of law to the Federal Court, viz: (i) whether disparate obligations to pay from time to time arising upon the occurrence/fulfilment of contingent events could be construed as a single continuing obligation so as to displace the effect of s 6(1)(a) of the Act; and (ii) whether the provisions of the Act would cease to apply to a breach of contract where the parties remained in contractual relationship.

Held, answering both questions in the negative and allowing the appeal with costs:

(1) The Court of Appeal was correct when it held that the claimant was entitled to overriding commission as a DSO (sales officer) on the sale of a group policy insurance secured by Indrani in 1986. The Circular made provision for the payment of overriding commission to an Immediate Superior at the rate 10% of the Group Scheme Agent's commission. That Immediate Superior could only be the claimant as it was he who recruited Indrani as one of his subordinate agents into his unit (see para 11).

(2) The Court of Appeal did not identify the specific evidence to establish the parties' intention that the obligation to pay overriding commission was a continuous one, and not from time to time as and when payment became due. Although the parties' relationship was strictly contractual, no reference was made by the Court of Appeal to any particular clause in the several agreements between the parties, to show that the parties had agreed to prolong the obligation to pay to some date in the future. There was thus no basis for the Court of Appeal to conclude that the obligation to pay overriding commission was a continuous obligation as the parties had intended it to be so (see para 14).

(3) A cause of action founded on contract accrues on the date of its breach and time begins to run from that breach. In the instant case, the claimant's cause of action only arose when the appellant allegedly breached its obligation to pay the claimant his commission in 1986. When the claimant filed his action in court in 1993, the claim had already become time-barred (see paras 16, 18); *Nasri v Mesah* [1970] MLJ 32 and *Board of Trade v Cayzer, Irvine & Co* [1972] AC 610 followed.

(4) In the instant case, there was no contractual modification or alteration in any of the contracts binding the claimant to the appellant that could be relied upon to shift the time of breach to some time in the future. In the absence of such modification, the general principle of law that time begins to run from the date of breach, applied (see para 21); *Loh Wai Lian v SEA Housing Corporation Sdn Bhd* [1987] 2 MLJ 1 referred.

(5) The Court of Appeal had also erred in concluding that so long as the parties remained in contractual relationship, no period of limitation existed. There was no basis for such a conclusion given that the Act itself prescribes when time begins to run for the purpose of computing limitation periods. The claimant's entitlement to overriding commission was governed by the Circular which came into effect on 1 January 1987. His claim was thus not maintainable as it related to the sale of a group insurance scheme sold in 1986 (see paras 23–24).

[Bahasa Malaysia summary

Pihak menuntut merupakan ejen dan DSO (pegawai jualan bahagian) dengan perayu. Beliau mendapat komisyen daripada polisi insurans nyawa yang dijualnya untuk perayu. Beliau juga berhak mendapat komisyen utama berkaitan jualan skim kumpulan insurans oleh ejen-ejen yang diperkenalkan olehnya kepada perayu. Pada tahun 1984, pihak menuntut memperkenalkan Indrani kepada perayu. Pada tahun

A 1986, Indrani telah menjual satu skim kumpulan insurans untuk perayu. Pihak menuntut telah membuat tuntutan untuk komisyen utama berdasarkan jualan Indrani. Perayu menafikan liabiliti berdasarkan satu Pekeliling yang mengawal hak untuk komisyen utama berdasarkan jualan Indrani. Perayu mendakwa bahawa menurut Pekeliling itu yang mula berkuat kuasa mulai 1 Januari 1987, tuntutan
B untuk komisyen utama berkaitan jualan sebelum 1 Oktober 1987 tidak layak. Memandangkan jualan Indrani adalah dalam tahun 1986, tiada komisyen perlu dibayar. Perayu dengan rasmi menyatakan keengganan ini melalui sepucuk surat bertarikh 16 Juali 1990. Dalam bulan April 1993, pihak menuntut telah memfailkan satu guaman terhadap perayu, menuntut antara lain, komisyennya berdasarkan jualan Indrani. Mahkamah Tinggi telah menolak tuntutan beliau berdasarkan, antara
C lain, alasan-alasan bahawa: (a) tuntutan untuk komisyen utama itu sebelum April 1987 telah luput had masa; dan (b) tiada peruntukan untuk komisyen utama dalam beberapa perjanjian yang mengawal hubungan pihak menuntut dengan perayu. Pihak munutut telah merayu kepada Mahkamah Rayuan yang, antara lain, telah membenarkan rayuannya berdasarkan: (i) Pekeliling itu memberi hak kepada beliau
D komisyen utama itu; dan (ii) tuntutannya tidak di luar had masa di bawah s 6(1)(a) Akta Had Masa 1953 ('Akta tersebut'). Mahkamah Rayuan berpendapat bahawa peraturan yang mengawal had masa tindakan-tindakan adalah disebabkan oleh niat pihak-pihak. Bahkan, tanggungjawab untuk membayar komisyen utama itu adalah suatu tanggungjawab berterusan. Mahkamah Rayuan memberikan kebenaran kepada perayu untuk mengemukakan persoalan undang-undang berikut kepada Mahkamah
E Persekutuan: (i) sama ada tanggungjawab yang berbeza itu untuk membayar dari masa ke semasa timbul daripada kejadian/penunaian bergantung pada kejadian boleh ditafsirkan sebagai satu tanggungjawab berterusan sehingga s 6(1)(a) Akta tersebut tidak memberikan kesan; dan (ii) sama ada peruntukan Akta tersebut tidak terpakai kepada perlanggaran kontrak di mana pihak-pihak masih mempunyai hubungan
F kontraktual.]

Diputuskan, menjawab kedua-dua persoalan secara negatif dan membenarkan rayuan dengan kos:

G (1) Mahkamah Rayuan adalah betul apabila memutuskan bahawa pihak menuntut berhak terhadap komisyen utama itu kerana sebagai seorang DSO (pegawai jualan) untuk jualan satu polisi kumpulan insurans yang dijual oleh Indrani pada tahun 1986. Pekeliling itu memperuntukkan untuk bayaran komisyen utama kepada Immediate Superior pada kadar 10% daripada komisyen Ejen Skim Kumpulan. Immediate Superior itu hanyalah pihak menuntut kerana
H beliaulah yang merekrut Indrani sebagai ejen bawahan dalam unit beliau (lihat perenggan 11).

(2) Mahkamah Rayuan tidak mengenal pasti keterangan spesifik untuk menunjukkan niat pihak-pihak bahawa tanggungjawab untuk membayar
I komisyen adalah suatu yang berterusan dan bukan dari masa ke semasa apabila bayaran perlu dilaksanakan. Meskipun hubungan pihak-pihak bersifat kontraktual semata-mata, tiada rujukan telah dibuat oleh Mahkamah Rayuan terhadap apa-apa fasal tertentu dalam beberapa perjanjian antara pihak-pihak, untuk menunjukkan bahawa pihak-pihak bersetuju untuk melanjutkan tanggungjawab untuk membayar itu kepada suatu tarikh kelak. Tiada asas

untuk Mahkamah Rayuan memutuskan bahawa tanggungjawab untuk membayar komisyen utama itu adalah suatu tanggungjawab yang berterusan kerana pihak-pihak berhasrat sedemikian (lihat perenggan 14).

(3) Satu kausa tindakan yang terdapat pada kontrak terakru pada tarikh perlanggarannya dan masa bermula daripada perlanggaran itu. Dalam kes semasa, kausa tindakan perayu hanya timbul apabila perayu dikatakan melanggar tanggungjawabnya untuk membayar pihak menuntut komisyennya pada tahun 1986. Apabila pihak menuntut telah memfailkan tindakan beliau di mahkamah pada tahun 1993, tuntutan itu telah pun luput had masa (lihat perenggan 16,18); *Nasri v Mesah* [1970] MLJ 32 dan *Board of Trade v Cayzer, Irvine & Co* [1972] AC 610 diikut.

(4) Dalam kes semasa, tiada perubahan kontraktual dalam mana-mana kontrak yang mengikat pihak menuntut kepada perayu yang digunakan untuk menukar masa perlanggaran kepada masa ke hadapan. Dengan ketiadaan sebarang perubahan sedemikian, rukun am undang-undang bahawa masa bermula dari tarikh perlanggaran adalah terpakai (lihat perenggan 21); *Loh Wai Lian v SEA Housing Corporation Sdn Bhd* [1987] 2 MLJ 1 dirujuk.

(5) Mahkamah Rayuan juga terkhilaf semasa membuat keputusan bahawa selagi pihak-pihak kekal dalam hubungan kontraktual, tempoh had masa tidak wujud. Tiada asas untuk kesimpulan sedemikian berdasarkan Akta tersebut itu sendiri yang menyatakan bahawa masa bermula bagi tujuan mengira tempoh had masa. Pihak menuntut berhak terhadap komisyen utama yang dikawal oleh Pekeliling yang mula berkuat kuasa mulai 1 Januari 1987. Tuntutannya tidak boleh dikekalkan kerana ia berkaitan jualan satu skim kumpulan insurans yang dijual pada tahun 1986 (lihat perenggan 23–24).

Notes

For cases on breach of contract under Limitation Act 1953 generally, see 9 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 2185–2191.

Cases referred to

Board of Trade v Cayzer, Irvine & Co [1972] AC 610 (folld)
Loh Wai Lian v SEA Housing Corporation Sdn Bhd [1987] 2 MLJ 1 (refd)
Nasri v Mesah [1971] 1 MLJ 32 (folld)

Legislation referred to

Housing Developer (Contract and Licensing) Rules 1970
Limitation Act 1953 s 6(1)(a)

Nallini Patmanathan (Ezane Chong with her) (Skrine) for the appellant.
K Siva Segara (Siva Segara & Co) for the respondent.

Siti Norma Yaakob CJ (Malaya) (delivering judgment of the court):

[1] The initial proceedings in this appeal were commenced by one NVJ Menon ('Menon') since deceased, who sued the appellant for commissions due to him from the sale of a group insurance scheme by an agent introduced by him to the appellant.

When he died on 26 November 2002, his daughter, the respondent before us, was substituted a party in the proceedings and she continued the action on behalf of his estate.

[2] Menon was also an agent of the appellant having joined the appellant as long ago as 1965 and he rose to the level of a Divisional Sales Officer within the appellant's heiraracy. In both capacities, he earned commissions from the life insurance policies he sold for the appellant and he was also entitled to overriding commission in respect of sales of group insurance schemes made by agents introduced by him to the appellant. It is in respect of this overriding commission that the instant appeal is founded.

[3] It is not disputed that Menon executed a number of agency agreements to regulate his relationship with the appellant and at the material times the following three contracts are most relevant:

(1) the Agency Agreement dated 8 July 1986, and the Schedule of Commissions attached to it which regulate Menon's entitlement to commissions as an agent;

(2) the Supplementary Agreement also dated 8 July 1986, containing terms and conditions relating to Menon's appointment as a Divisional Sales Officer ('DSO') and attached to it is the Schedule of Remuneration identifying the different types of commission that Menon was entitled to as a DSO; and

(3) the Circular No 2/1987/GIS (GS) dated 27 October 1987, regulating Menon's entitlement to overriding commissions on group insurance schemes effective from 1 January 1987. This Circular was issued pursuant to cl 18 of the Agency Agreement and formed part of the latter.

[4] During his agency with the appellant, Menon recruited a number of subordinate agents in his unit. One of them was Indrani Subramaniam ('Indrani') whom Menon recruited in 1984.

[5] In 1986, Indrani procured a group insurance scheme for the appellant and it is in respect of the overriding commission payable that Menon had made a claim on the appellant, who denied liability on the ground that his entitlement under the Circular had not become due. This is so as the Circular specifying his entitlement became effective only on 1 October 1987 and that claims before that date did not qualify. Since Indrani procured the group insurance scheme in 1986, the appellant refused payment and this was formally indicated by its letter dated 16 July 1990.

[6] Menon filed a suit against the appellant on 8 April 1993, pleading a number of prayers but at the hearing confined them to a declaration that he was entitled to the full benefit of all the business conducted by Indrani, ie payment of overriding commission as well as an account of all the transactions conducted by Indrani or in the alternative damages.

[7] The appellant's defence was twofold:

(1) that Menon was not entitled to the commission claimed under the Circular; and

(2) that his claim was time barred.

[8] The High Court dismissed Menon's claim based on the following findings:

(1) that his claim for overriding commission for the period prior to 8 April 1987 is time barred;

(2) if not time barred, there is no provision for overriding commission in the Agency and Supplementary Agreements;

(3) his claim for overriding commission after 8 April 1987 cannot be maintained as he did not assist Indrani in securing and servicing the group insurance schemes procured by Indrani; and

(4) the appellant had not committed any breach of contract based on convention, custom and practice in the insurance trade to entitle Menon to claim damages against the appellant.

[9] Menon took his case to the Court of Appeal which allowed his appeal and reversed the decision of the High Court after arriving at the following conclusions:

(1) that the Circular entitled him to claim overriding commission on the sale of a group insurance scheme transacted by Indrani; and

(2) although his claim arose more than six years prior to the filing of his suit, it was not time barred under s 6(1)(a) of the Limitation Act 1953 ('the Act').

[10] This court then granted leave to the appellant to pose two questions of law which read as follows:

- whether disparate obligations to pay from time to time arising upon the occurrence/fulfillment of contingent events, can be construed as a single continuing obligation so as to displace the effect of s 6(1)(a) of the Act; and
- whether the provisions of the Act, cease to apply to breach of contract, where the parties remain in contractual relationship.

[11] With regard to the first conclusion, the Court of Appeal was correct when it held that Menon was entitled to overriding commission as a DSO on the sale of a group policy insurance secured by Indrani in 1986. This is so as the Circular at para II(A)(i) makes provision for the payment of overriding commission to an Immediate Superior at the rate 10% of the Group Scheme Agent's commission. That Immediate Superior can only be Menon as it was he who recruited Indrani as one of his subordinate agents into his unit.

[12] On the issue of time bar, Menon had contended before the Court of Appeal that his cause of action for the purpose of s 6(1)(a) of the Act, only arose after 16 July 1990, when he received a letter from the appellant informing him that it would not honour its obligation to pay his overriding commission for the group insurance policy transacted by Indrani. As such when he filed his civil suit in April 1993, he was well within the six-year limitation period.

[13] The Court of Appeal agreed with Menon but dealt the matter in the following manner:

> In the present case, we find the general rule governing the limitations of actions to have been displaced by a contrary intention evinced by the parties in this case. It was the intention of parties here, we find that the obligation to pay an overriding commission to the plaintiff to be a continuous one. Put another way, there was an obligation upon the defendant to continuously pay overriding commission to the plaintiff as and when they fell due. When that obligation was breached, its consequences flowed continuously and not from time to time. Such a continuous obligation is found here therefore displaces the ordinary rule governing breach of contract. Accordingly, the plaintiff's cause of action arose at least in 1990 when the defendant informed him that it would not honour its continuing obligation. Alternatively, on a true construction of the agreement, this is a contract to which no period of limitation applies for so long as the parties remain in contractual relationship, ie so far as the overriding commissions on group scheme policies are concerned.

[14] I take issue with the Court of Appeal on this ruling as firstly it did not identify the specific evidence to establish the parties' intention that the obligation to pay overriding commission was a continuous one and not from time to time as and when payment became due. As the parties' relationship is strictly contractual, no reference was made by the Court of Appeal to any particular clause in any of the three agreements I have referred, to show that the parties had agreed to prolong the obligation to pay to some date in the future. I have perused the three documents but cannot find any provision expressing such an intention on the part of the parties. As such, there was no basis for the Court of Appeal to conclude that the obligation to pay overriding commission was a continuous obligation as the parties had intended it to be so.

[15] In upholding Menon's contention that his claim was not time barred, the Court of Appeal treated the appellant's obligation to pay overriding commissions as and when they accrued from time to time as one continuous obligation that arose from the sales of such policies. The effect of such a finding is that time did not begin to run as and when each overriding commission is due to Menon but is postponed to some date in the future. The Court of Appeal then identified that date to be after 16 July 1990, when the appellant formally notified Menon that it was not going to pay him the overriding commission. Hence, when Menon sued the appellant in 1993, he was well within the six year statutory limit.

[16] In arriving at that finding, the Court of Appeal has completely rewritten the law of contract governing limitation of actions. Section 6(1)(a) of the Act provides that:

> … actions founded on a contract shall not be brought after the expiration of six years from the date on which the cause of action accrued.

The law on, when a cause of action accrues is already well settled and very much entrenched in our jurisprudence which is this. A cause of action founded on contract accrues on the date of its breach and that time begins to run from that breach (see the case of *Nasri v Mesah* [1971] 1 MLJ 32 which followed *Board of Trade v Cayzer, Irvine & Co* [1972] AC 610).

[17] Applying that general principle of law when did Menon's cause of action arise? It can only arise when the appellant breached its obligation to pay. When did that obligation to pay arise? That obligation arose the moment the appellant received the cash premium due on the sale of the group insurance scheme transacted by Indrani. As the obligation to pay also triggers Menon's entitlement to be paid, cl 5 of the Agency Agreement becomes very relevant as it spells out Menon's entitlement to overriding commission with the following provisions:

> The Agent's remuneration shall be by way of commission …. Such commission shall only be payable on cash premiums *actually charged and received* by the company during the currency of this agreement…. (Emphasis added.)

[18] It is not disputed that the premiums payable to the appellant on the one group insurance scheme secured by Indrani in 1986 had already been received by the appellant in the same year and it was upon receipt of this premium that the appellant's obligation to pay arose as well as Menon's entitlement to be paid. When demand was made by Menon, the appellant refused payment, thereby breaching its obligation to pay and it is at that point of time that time begins to run. Calculating the six-year time bar from 1986 when Menon's cause of action arose until 1993, when Menon filed his claim in court, clearly his claim has become time barred.

[19] Of course it is open to the parties to regulate or modify their rights in the event of a breach in any way they think fit, but the bottom line is still the interpretation to be given to the terms of a particular contract.

[20] One such case is found in the decision of the Privy Council in *Loh Wai Lian v SEA Housing Corporation Sdn Bhd* [1987] 2 MLJ 1, which was relied upon by the Court of Appeal. That case dealt with a contract between a housing developer and a purchaser under the Housing Developer (Contract and Licensing) Rules 1970 where two of the terms specify the date of the completion of the house whilst the other the developer's obligation to indemnify the purchaser for any loss suffered in the event there has been a delay in the delivery of the house for occupation. In such an event, the loss suffered shall be calculated at a specified rate from the date when possession ought to have been given until the date when possession was in fact given. Although this court agreed with the High Court that the purchaser's claim was time barred, the Privy Council held that since the parties had agreed to a single aggregate sum which could not be calculated until the house was completed and handed over, time did not run until that date. By the agreement, the breach had been shifted from the date the house was to be completed to a date when the house was actually handed to the purchaser.

[21] Unlike Loh Wah Lian, there is no contractual modification or alternation in any of the contracts binding Menon to the appellant that can be relied upon to shift the time of breach to some time in the future. In the absence of such modification or alteration, the general principle of law that time begins to run from the date of breach applies. Thus from the very nature of the contracts that Menon had with the

appellant, it cannot be said that the obligation to pay overriding commission is a continuous one and that it had the effect of displacing the general law governing the limitation of actions.

[22] In the circumstances of this appeal, all that the appellant is obliged to do is to pay the overriding commissions from time to time to Menon as and when they became due. They became due as and when the appellant received the premiums due on group insurance schemes successfully transacted by Indrani. Such obligations are disparate obligations that arise at different times and with each breach, there arises a complete and distinct cause of action in itself, and time begins to run immediately upon every successive breach. As such had Indrani secured say three group insurance schemes at different times, the appellant would breach its obligations to pay if it refused payment on the receipt of each premium due at differing times on the three group insurance schemes. Such breaches occurring at different times, I say, cannot be merged into one continuing obligation as suggested by the Court of Appeal.

[23] The Court of Appeal had also reached an alternative finding that so long as the parties remain in contractual relationship no period of limitation exists. This is again another attempt at creating uncertainty in the law governing limitation of actions as the effect of such a finding is to leave open the calculation when time begins to run. This cannot be right as there is no basis for such a finding as the Act itself has already set down the timetable as to when time begins to run for the purpose of computing limitation periods.

[24] Finally as Menon's entitlement is overriding commission is governed by the Circular which came into effect on 1 January 1987, his claim is not maintainable as it relates to the sale of a group insurance scheme sold in 1986. This the Court of Appeal failed to consider.

[25] For the reasons appearing in this judgment the two questions posed to this court are replied in the negative and consequently this appeal is allowed with costs and the deposit is to be refunded to the appellant.

[26] My brother judges, Steve Shim CJ (Sabah & Sarawak) and Abdul Hamid Mohamed FCJ, who have had sight of this judgment in draft agree to the conclusions that I have reached.

Appeal allowed with costs.

Reported by John Paul Simon